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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1217

RAY S. BAILEY, *Petitioner*

v.

ELLIS MACDOUGALL, Director of The Department of Corrections for the State of South Carolina, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Petitioner, Ray S. Bailey, prays that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court, discharging a writ of habeas corpus and remanding petitioner to custody for service of a life sentence, entered on November 10, 1965, rehearing denied and remittitur sent down, December 14, 1965.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court, as yet unreported in the State reports but reported at 145 S.E. 2d 425 (1965), is appended (App. pp. 1a-13a). The petition for rehearing and order of denial without opinion is printed in Appendix hereto (App. pp. 14a-18a).

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on November 10, 1965, rehearing denied and remittitur sent down on December 14, 1965 (App. p. 18a). The jurisdiction of this Court is invoked under Title 28, U.S. Code, section 1257(3). By order of March 11, 1966, the time for filing this petition was enlarged to April 14, 1966.

QUESTIONS PRESENTED

(1) Whether a conviction upon a guilty plea negotiated by the prosecutor with full knowledge that he had insufficient evidence to secure a conviction if the accused was brought to trial, without disclosure of that fact to either the Court or defense counsel, is such a violation of due process under the Fourteenth Amendment as to entitle the accused to release from custody?

(2) Whether the Court's acceptance of a plea of guilty to a capital offense can stand where the Court did not require the prosecutor to disclose the State's evidence and failed to exercise the basic due process requirements of ascertaining if the accused was entering the plea freely and deliberately with full knowledge of the nature and consequences of the plea?

(3) Whether a written agreement signed by the prosecutor and Chief of Police to recommend a pardon

or parole after the accused had served a period not exceeding ten years was an implied promise of leniency which destroyed the voluntary nature of his guilty plea?

STATEMENT

Petitioner, Ray S. Bailey, was indicted August 25, 1932, on a charge of murder in the Greenville County Court of General Sessions and tried in January, 1936, having been extradicted to the State of South Carolina from the State of North Carolina pursuant to the decision of this Court in *State of South Carolina* v. *Ray Bailey,* 289 U.S. 412, (1933). Petitioner changed his plea to guilty of murder with recommendation to the mercy of the Court, following the negotiation of an agreement, which was reduced to writing (App. p. 19a), between the then prosecutor, the Chief of Police and petitioner's attorney, the agreement being that the prosecutor and Chief of Police would recommend a pardon or parole after the petitioner had served a period not exceeding ten years. Neither the fact nor the contents of the agreement was disclosed to the Court, and the petitioner was sentenced to be confined for a term of his whole natural life.

On May 4, 1964, the petitioner, through counsel, filed a petition for a Writ of Habeas Corpus in the Court of Common Pleas for Richland County, alleging that his restraint under the above sentence was unlawful and in violation of his constitutional rights under both the State and Federal Constitutions, asserting among other things a denial of due process of law and that his guilty plea was induced by a promise that he would serve only ten years or possibly less of the sentence. The Honorable John Grimball, Judge, Fifth

Judicial Circuit, issued the Writ of Habeas Corpus, and hearings were held.

Defense counsel for petitioner at the time of his trial and the prosecutor, Mr. J. G. Leatherwood, solicitor for the Thirteenth Judicial Circuit in 1936, offered testimony in the habeas corpus proceeding stating that they entered into negotiation concerning a possible guilty plea, that the prosecutor did not personally confer with the petitioner, and that the written agreement was presented to him by his attorney.

The prosecutor testified that he initiated the negotiations to get the petitioner to plead guilty (TR-87) because the irregularities in the attempted arrest, coupled with the refusal of the principal witness for the State to testify, made the possibility of getting conviction extremely remote (TR-85-86, 92-93). He further testified that the facts of the deficiency of the State's case were not known to petitioner's attorney (TR-86, 100) during the negotiations for the plea, or to the Court at the time the plea was entered (TR-89).

By Order of July 29, 1964, Judge Grimball set aside the guilty plea and sentence on the grounds that it was induced by the promise with respect to the sentence, and remanded the case to Greenville County for a new trial. The petitioner was released from custody after posting bond. The State appealed to the Supreme Court of South Carolina.

The Supreme Court of South Carolina reversed and remanded, discharging the Writ of Habeas Corpus on November 10, 1965, — S.C. —, 145 S.E. 2d 425 (1965). Petition for rehearing was filed on November 18, 1965, to focus the attention of the Court on the question of non-disclosure by the prosecutor, but rehearing was denied without opinion on December 14, 1965.

REASONS FOR GRANTING THE WRIT

I.

Constitutional Due Process Cannot Be Satisfied Where the Prosecution Negotiates a Guilty Plea Knowing It Has No Other Means To Obtain a Conviction and Fails To Disclose This Fact to Either the Defendant's Counsel or the Court

The obligation of the prosecutor in a criminal case is clearly set forth by Justice Sutherland, speaking for this Court in *Berger* v. *United States,* 295 U.S. 78, 88 (1935) in these words:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

While the Berger Case refers to a United States Attorney, clearly the same obligation would apply to a State Prosecutor. See Canon Five of the American Bar Association Canons of Professional Ethics which states, "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."

This Court has held in two cases, *Wilde* v. *Wyoming,* 362 U.S. 607 (1960), *Pyle* v. *Kansas,* 317 U.S. 213

(1942), and stated in a third, *Mooney* v. *Holohan*, 294 U.S. 103, 113 (1935), that when the petitioner has alleged *inter alia*, suppression of evidence through intimidation of witnesses by the prosecution that relief may be granted on a petition for habeas corpus.

What non disclosure by a prosecutor violates due process is set forth in *Mooney* v. *Holohan, supra,* in these words:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of Court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demand of justice as is the obtaining of a like result by intimidation."

The rule was broadened in *Pyle* v. *Kansas, supra,* where this Court said:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by these same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and if proven, would entitled petitioner to release from his present custody."

Two other cases, both from the Third Circuit, *United States ex rel. Almeida* v. *Baldi,* 195 F. 2d 815 (3rd Cir. 1952), cert. den. 345 U.S. 904 (1953), and *United States ex rel. Thompson* v. *Dye,* 221 F. 2d 763 (3rd Cir. 1955), reh. den. May 23, 1955, have set aside convic-

tions on the ground that failure to disclose the existence of exculpatory evidence violated the due process clause and the Court did not indicate a difference between active suppression and passive non-disclosure in these cases, but in the *Baldi Case* construed the statement in *Pyle* v. *Kansas, supra,* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process.

Other Federal Courts have struck down convictions on the ground that the prosecutor failed to disclose exculpatory evidence when an examination of the trial record showed that the defendant was prejudiced without reference to the due process requirement. See *United States ex rel. Montgomery* v. *Ragen,* 86 F. Supp. 382 (N.D. Ill. 1949). What more prejudice need be shown than twenty-eight years of confinement?

This Court in *Napue* v. *Illinois,* 360 U.S. 264 (1959), has extended the test formulated in *Mooney* v. *Holohan, supra,* by saying: "It is established that a conviction obtained through the use of false evidence known to be such by the representatives of the State must fall under the Fourteenth Amendment." And further in the same case: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." See *Alcorta* v. *Texas,* 355 U.S. 28 (1957).

This area of the law was further strengthened by the decision of this Court in *Brady* v. *Maryland,* 373 U.S. 83 (1963), when this Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punish-

ment, irrespective of the good or bad faith of the prosecution."

And the most recent case of *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842 (4th Cir. 1964) extends the due process safeguard and distinguishes the Brady decision on the point of the request by counsel for the evidence suppressed. In the *Barbee Case,* the Court said:

> "In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel .... 'The cruelest lies are often told in silence.'
>
> The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but, if he too is the victim of police suppression of the material information, the state's failure is not on that account excused."

This Court said in *Rochin* v. *California,* 342 U.S. 165 (1952), that "due process of law, as a historic and generative principle precludes defining and thereby confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice'."

Surely, nothing can be more offensive to the sense of justice than the conduct of the prosecution in the instant case where the objective of a conviction for the State was to be achieved at any price, even to bargaining for a guilty plea with an agreement which the presecution knew to be unenforcible against the State in exchange for a conviction which otherwise could not be obtained. By every standard of fair play, this was a violation of due process.

II.

It Is the Duty of the Court To Exercise the Basic Due Process Requirement of Ascertaining the Voluntary Character of a Guilty Plea to a Capital Offense and To Advise the Accused as to the Consequences of the Plea.

The fundamental right of an accused to be informed of the crime with which he is charged has been regarded as including the right to be informed of the consequences of a conviction thereon.

A plea of guilty in a capital case should be accepted cautiously and not until after the accused has been fully advised by the Court of his rights and the consequences of his plea and the court has been satisfied that the accused has acted voluntarily and with full knowledge, appreciation and understanding of the nature and consequences of the plea. The fact that the accused is represented by counsel at the time he offers a plea of guilty does not relieve the court of its duty to him. State cases are collected in the annotation in 97 ALR 2d 552 on the subject of the court's duty to advise or admonish an accused as to the consequences of a guilty plea.

Rule 11 of the Federal Rules of Criminal Procedure provides that the court may refuse to accept a plea of guilty, and "shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge". This rule, although not expressly including the "consequences" of a plea of guilty as a specific category to which the accused's knowledge must extend, has been regarded as confirmatory of the proposition, previously recognized, approved, and applied in the federal courts, that an accused can make a valid plea of guilty only with the knowledge and appreciation of its consequences. Also

where it does not appear that an accused who offers a plea of guilty possesses such knowledge and appreciation, it is the duty of the court to see that he has it, before accepting the plea.

Although the State courts are not bound by the Federal Rules, they are bound by the requirements of due process and it is submitted that those rules are simply expressive of the policy of the law in the absence of such expressed requirements. The record before this Court clearly shows that the Trial Judge had no knowledge of the arrangements made between the prosecutor and the accusd in exchange for the plea of guilty[1] and that he made no attempt to inform himself of the circumstances of the plea or to admonish the accused concerning the consequences of the plea (TR. 46-47). In fact, the accused, at that time a young man of 26 years, did not in fact speak in the courtroom except to give his age.

The very early cases emphasized what is settled by modern decisions, and in some States by statute, that a court should never accept a plea of guilty, especially in a capital case, without exercising caution and being satisfied *by evidence* that the confession is made by the accused freely and deliberately, and with full and per-

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[1] Plea bargaining is an accepted practice in federal criminal trials subject to court supervision and approval. Federal Rules of Criminal Procedure, Rule 11; *Shelton* v. *United States*, 246 F. 2d 571 (5th Cir. 1957). However, the same practice in the State of South Carolina is for the most part entirely without the ambit of judicial supervision. It is a matter almost entirely within the hands of the prosecutor who determines what plea will be accepted and under what conditions; a system obviously open to abuse of defendant's rights and violative of due process requirements of judicial supervision of this important phase of administration of criminal justice.

fect knowledge of the nature and consequences of the confession; otherwise the plea should not be received.[2] It is the constitutional right of everyone accused of crime to a trial by jury and although this is a right which may be waived, the accused is not bound by his confession, except when it has been made deliberately and under the deepest solemnities. Examples of early precedent and case authority in this connection are found in 1 Greenleaf Evidence, 15th Ed., Sec. 216; 1 Chitty, Criminal Law (1847) 428; 2 Bishop New Crim. Proc., 2d Ed. Sec. 795, p. 619. An excellent discussion of this phase of criminal justice is found in *State* v. *Johnson,* 21 Okla. 40, 96 Pac. 26 (1908).

There is not now nor was there at the time of petitioner's trial any statutory requirement or court rule in South Carolina requiring the accused to be accorded the basic due process requirement of being advised by the court as to the nature and consequences of his plea, but, as stated by the court in the *Johnson Case:*

> We have no such statute to control the discretion of the Courts in this state, but the authorities above cited are sufficient to indicate the policy of the law in the absence of such direct requirements.

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[2] The voluntary nature of the guilty plea in this case was destroyed by the fact and content of the written agreement by the prosecutor and Chief of Police to recommend parole for petitioner within ten years. At the time this agreement was made a recommendation to parole by a prosecutor to the Governor was tantamount to an accomplished fact of parole. However, by the time petitioner was due for consideration under terms of the agreement the probation and parole system for the State had been drastically changed, placing the parole function in the hands of a Parole Board with broad discretionary powers. The record indicates petitioner believed the written agreement was a guarantee of freedom within ten years or less. Therefore, the agreement was the motivating cause for the plea and was a subverting factor so that the choice was not clearly and freely responsible. *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948).

Even in the absence of a statutory duty on the Court to ascertain the voluntary character of a guilty plea the basic requirements of due process demand the court provide this protection to the criminally accused. This requirement has a deep rooted place in our history that can be traced back to our English heritage. See Blackstone, Commentaries at page 329 and Bowyer, Commentaries on the Constitutional Law of England (1846) at page 355.

SUMMARY

The record of this case clearly shows a violation of due process in several areas of the proceedings which cannot be cured by the fact that the accused was represented by counsel or dismissed as harmless error. These departures from due process go to the very heart of the fundamental fairness required in the administration of criminal justice. Foremost among these departures was the prosecutors concealment of evidence favorable to the petitioner. Counsel could not adequately or effectively represent petitioner when he was not aware of the fatal deficiency in the State's case, and could not, by his own diligence, ascertain the true situation in view of the prosecutor's conscious effort to conceal the circumstances surrounding his chief witness.

The prosecutor failed in his duty to justice and the State when he knowingly bargained for the guilty plea as his only means of obtaining a conviction and when he failed to inform the Court of the quality of the evidence available to him.

The Court failed in its judicial duty in accepting a plea of guilty to a capital offense without satisfying itself that the plea was made freely and voluntarily with full knowledge of the consequences. Having been put on notice by the plea of not guilty at the arraign-

ment, the Court was duty bound to inquire into the circumstances of the guilty plea and to require the prosecution to present the State's evidence for judicial consideration before accepting the plea. Had the Court carried out its duties in this respect it would have discovered the petitioner honestly believed the written agreement with the prosecutor was a guarantee of freedom within ten years or less and that he was improperly influenced in his plea by the very fact of this agreement.

These violations of the petitioner's right to a criminal trial with full observance of all the due process requirements of such a trial can only be remedied by granting him absolute release from custody after nearly thirty years of confinement.

CONCLUSION

State suppression of favorable evidence from a criminal defendant, connected with a plea bargaining process not judicially supervised, and the indifferent and pro forma acceptance of a thoroughly suspect guilty plea by a trial court falls far short of the constitutional requirements of due process. The establishment of uniform requirements of due process in this connection to insure proper administration of criminal justice in State criminal trials warrants definitive action by this Court.

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